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No. 94-184

In The

Supreme Court of the United States

October Term, 1994

PAUL S. MIRMAN,

Petitioner,

vs.

NEW JERSEY SUPREME COURT and the
NEW JERSEY BOARD OF BAR EXAMINERS,

Respondents.

On Petition For A Writ Of Certiorari
To The Third Circuit Court Of Appeals

BRIEF IN OPPOSITION

DEBORAH T. PORITZ
Attorney General of New Jersey
Attorney for Respondents
New Jersey Supreme Court and the
New Jersey Board of Bar Examiners
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

ANDREA M. SILKOWITZ
Assistant Attorney General
Counsel of Record

PATRICIA A. SCHIRIPO
Deputy Attorney General
On the Brief

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the New Jersey Supreme Court's requirement that an applicant for admission to the New Jersey bar examination provide a certificate of good standing from every jurisdiction to which the applicant has been admitted denies due process or equal protection to a former attorney who is refused admission without a hearing because he has been disbarred in the State of New York.

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COUNTERSTATEMENT OF THE CASE

Paul S. Mirman (Mirman) was admitted to the bar of the State of New York in 1971 and was disbarred on May 20, 1991, by order of the New York Supreme Court. (JA4; Pa10).[1] *See also In re Mirman*, 569 *N.Y.S.*2d 981 (App. Div.), *appeal dismissed*, 582 *N.E.*2d 593 (N.Y. 1991), *cert. denied*, ___ *U.S.* ___, 112 *S.Ct.* 1561 (1992). He then sought admission to the bar of the State of New Jersey.

Pursuant to its constitutional powers,[2] the New Jersey Supreme Court has promulgated a variety of rules governing qualifications for admission to the bar. The New Jersey Supreme Court has also directed the New Jersey Board of Bar Examiners (the Board) to "prepare and conduct examinations for applicants for admission as attorneys." (JA5); New Jersey Court Rules 1:23-1 and 1:23-2.

In May 1992, Mirman applied to take the July 1992 New Jersey bar examination. (JA5). By virtue of the fact that he had been disbarred in New York, the Board informed him that he was not qualified to take the examination in New Jersey. (JA5). Specifically, Mirman was informed that "[n]o person shall be admitted to the bar

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[1] "JA" refers to the Joint Appendix filed with the Third Circuit Court of Appeals. "Pa" refers to petitioner's appendix.

[2] Article VI § II ¶3 of the New Jersey Constitution provides that the New Jersey Supreme Court

> shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts . . . [and] shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

examination unless he first presents to the Board . . . [s]atisfactory evidence that he is a member of the bar in good standing in every other jurisdiction in which he was ever admitted to practice." New Jersey Court Rule 1:24-2(c).

On December 17, 1992, Mirman filed a complaint in the United States District Court for the District of New Jersey against the New Jersey Supreme Court and the Board. He alleged that the requirement that applicants submit a certificate of good standing from all states to which they were ever admitted and the Board's consequent refusal to allow him to take the bar examination was "unreasonable, arbitrary and capricious, and therefore denie[d] Plaintiff equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States." (JA5-JA6). The New Jersey Supreme Court and the Board filed an answer on or about February 5, 1993.

At the initial pretrial conference before the Honorable Stanley R. Chesler, U.S.M.J., the parties agreed that no discovery was required since the material facts were not in dispute. Accordingly, the court entered an order directing the parties to file briefs in support of cross-motions for summary judgment. (JA14-JA15). By an order filed July 19, 1993, the District Court, Honorable Maryanne Trump Barry, U.S.D.J., granted respondents' motion for summary judgment and denied petitioner's cross-motion. (Pa3-Pa9). The court found that petitioner had not presented a cognizable property or liberty interest in taking the New Jersey bar examination, and, therefore, dismissed his due process claim. (Pa5-Pa6). Also, the Court rejected petitioner's equal protection argument

because petitioner had failed to allege a classification. (Pa6 n.1).

Petitioner appealed to the Third Circuit Court of Appeals. That court affirmed without opinion. (Pa1-Pa2).

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE NEW JERSEY COURT RULE THAT PREVENTED PETITIONER FROM SITTING FOR THE NEW JERSEY BAR EXAMINATION WITHOUT A HEARING BECAUSE HE IS UNABLE TO PRODUCE A CERTIFICATE OF GOOD STANDING FROM THE STATE OF NEW YORK DOES NOT DENY DUE PROCESS OR EQUAL PROTECTION.

A. APPELLANT HAS FAILED TO ASSERT A LIBERTY OR PROPERTY INTEREST THAT MERITS PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

New Jersey's requirement that applicants provide a certificate of good standing from jurisdictions to which they were admitted does not implicate a liberty interest protected by the Due Process Clause. Accordingly, petitioner had no right to a hearing before his application for admission was denied. More importantly, New Jersey's interest in insuring the highest standards for members of the bar and its desire to avoid needlessly relitigating issues previously litigated in New York far outweigh the petitioner's interest in an additional hearing.

The Supreme Court has long eschewed a bright-line definition of due process recognizing instead that due

process analysis does not lend itself to "a technical conception with a fixed content. . . . " *Cafeteria and Restaurant Workers Union v. McElroy*, 367 *U.S.* 886, 895 (1961). Rather, the concept is an inherently flexible one in which the weight of the interest defines the required procedural protection. *Zinermon v. Burch*, 494 *U.S.* 113, 127 (1990); *Morrissey v. Brewer*, 408 *U.S.* 471, 481 (1972).

The inquiry does not begin, however, with a balancing of interests. The Court must first determine whether the right to practice law is an interest protected by the Fourteenth Amendment. *Board of Regents v. Roth*, 408 *U.S.* 564, 571 (1972). Government action threatens a liberty interest only " 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. . . . ' " *Roth*, 408 *U.S.* at 573 (quoting *Wisconsin v. Constantineau*, 400 *U.S.* 433, 437 (1971)). For two reasons, petitioner's contention that his employment opportunities have been affected is erroneous. First, in order to rise to the level of a protected liberty interest, petitioner has to show more than an injury to his reputation. *Siegert v. Gilley*, 500 *U.S.* 226, 111 *S.Ct.* 1789, 1794 (1991) (citing *Paul v. Davis*, 424 *U.S.* 693, 708-09 (1976)).

In *Paul v. Davis*, the Court reviewed *Roth* stating that that Court had recognized that:

> [G]overnmental action defaming an individual in the course of declining to rehire him could entitle him to notice and an opportunity to be heard as to the defamation [but that] its language [was] quite inconsistent with any notion that defamation perpetrated by a governmental official but unconnected with any refusal to

> rehire would be actionable under the Fourteenth Amendment.[3]

[*Id.* at 709.]

Thus, the *Paul v. Davis* Court clearly stated that injury to a person's reputation without more is not a violation of the Constitution. Here, the Board simply wrote to Mirman informing him that he could not sit for the New Jersey bar examination. The Board's action was not connected with the denial of Mirman's employment and, thus, that action alone does not deprive petitioner of a protected liberty interest under the standard set forth in *Paul v. Davis.*

Second, nothing about the requirement of a certificate of good standing could be found to "limit[] plaintiff's employment opportunities, as would be required to support a finding of deprivation of liberty under the Due Process Clause." *Maynard v. United States Dist. Court for the Central Dist. of California*, 701 *F.Supp.* 738, 743 (C.D. Cal. 1988) (local rule requiring applicants to provide a certificate of good standing from the State of California where applicant is a California resident and a member of the Indiana Bar, but not a member of the California Bar, is not a deprivation of liberty because the rule does not "impose [a] . . . disadvantage that would limit plaintiff's employment opportunities."), *aff'd*, 915 *F.*2d 1581 (9th Cir. 1990), *cert. denied*, ___ *U.S.* ___, 111 *S.Ct.* 2889 (1991) (citing *Roth*, 908 *U.S.* at 573-74). *Accord Matter of Roberts*, 682 *F.*2d 105, 107 (3d Cir. 1982).

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[3] Petitioner has not alleged that respondents defamed him.

Numerous courts, in addition to the *Maynard* Court, have held that general bar admission requirements such as the one at issue here do not threaten an applicant's liberty interest for purposes of Due Process analysis. *Nolan v. Ramsey*, 597 F.2d 577, 580 (5th Cir. 1979); *Nordgren v. Hafter*, 616 F.Supp. 742, 756 (S.D. Miss. 1985), *aff'd*, 789 F.2d 334 (5th Cir.), *cert. denied*, 479 U.S. 850 (1986); *Ostroff v. New Jersey Supreme Court*, 415 F.Supp. 326, 329 (D.N.J. 1976); *Potter v. New Jersey Supreme Court*, 403 F.Supp. 1036, 1039 (D.N.J. 1975), *aff'd*, 546 F.2d 418 (3d Cir. 1976). Petitioner appears to argue that these cases were wrongly decided and cites instead to cases such as *Schware v. Board of Bar Examiners*, 356 U.S. 232 (1956), and *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), for the proposition that the right to pursue the practice of law is a liberty interest protected by the Fourteenth Amendment.

Petitioner supports his challenge to general bar admission requirements with cases where the moral fitness of an individual candidate was at issue. For example, petitioner cites *Willner*, a case in which the admissions authority conceded that plaintiff met all of the objective criteria for admission to the bar. Willner had passed the bar exam, but was found to lack "good moral character" without ever having an opportunity to confront the witnesses against him or present favorable witnesses. 373 U.S. at 105. The Court held that he was denied due process. *Id.* at 106.

Willner does not, however, govern circumstances in which the plaintiff attacks general bar admission requirements. In *Potter v. New Jersey Supreme Court*, plaintiff challenged New Jersey's requirement that persons who

apply to take the bar examination provide proof that they graduated from a law school accredited by the American Bar Association (ABA). Plaintiff cited *Willner* for the broad proposition that every bar candidate must be afforded due process before his application could be rejected. A three-judge court held that "[c]ases . . . which appear to extend a requirement of procedural due process to the 'bar candidate' situation are distinguishable from the instant case in that they concerned allegations of moral unfitness directed personally to individual candidates, while this case involves a challenge to the imposition of general prerequisites to admission." 403 *F.Supp.* at 1039. *Accord Nordgren*, 616 *F.Supp.* at 756 (denial of admission in *Willner* and *Schware* distinguished from denial on grounds that applicant had not graduated from ABA accredited law school).

Moreover, a claim to a professional license does not rise to the level of a protected property interest where the plaintiff can only show an "abstract need or desire for [the license]" or "a unilateral expectation of it." *Roth*, 408 *U.S.* at 577. *See also Unger v. National Residents Matching Program*, 928 *F.*2d 1392, 1396-97 (3d Cir. 1991) (plaintiff had no property interest in an abstract expectation that she would enter a medical residency program); *Anderson v. City of Philadelphia*, 845 *F.*2d 1216, 1220-21 (3d Cir. 1988) (plaintiff who was high on civil service list still had insufficient expectation of promotion to constitute property interest). In *Roth*, plaintiff's appointment to the faculty at Wisconsin State University was to terminate on a specific day with no provisions whatsoever for renewal. The Court held that because the "terms of the respondent's appointment secured absolutely no interest in

re-employment for the next year" and no "statute or University rule or policy . . . secured his interest in re-employment," plaintiff had no constitutional right to a hearing when he was not rehired. 408 *U.S.* at 578. *Compare Cleveland Bd. of Educ. v. Loudermill*, 470 *U.S.* 532, 538 (1985) (plaintiff had a protected property interest in continued employment where he could not be dismissed except for "misfeasance, malfeasance or nonfeasance in office").

Petitioner here is likewise unable to show a sufficiently concrete expectation of admission to the New Jersey Bar to constitute a property interest. Indeed, the facts faced by this Court are less compelling than those that failed to sustain a claim in *Roth*. Unlike the plaintiff in *Roth* who had been employed by the defendant for several years, a bar applicant has no prior association with the New Jersey Bar upon which to form an expectation. The bar applicant's case is analogous to the hypothetical case in which Roth was merely an applicant to Wisconsin State University.

Attorneys who have been disbarred or suspended in other states and will be unable to obtain a certificate of good standing from those states have no reasonable expectation that they will be allowed to practice in New Jersey. Nor, for that matter, would a person who is not eighteen years of age, New Jersey Court Rule 1:24-2(a), or a person who has not graduated from an ABA approved law school. New Jersey Court Rule 1:24-2(b). In other words, New Jersey's "bright-line" requirement that attorneys show that they were in good standing in the other jurisdictions to which they are admitted is identical to

Wisconsin State University's employment contract – neither creates a reasonable expectation that a benefit will be conferred.

Accordingly, since New Jersey's court rule does not threaten either a property or liberty interest, the Court of Appeals properly upheld the District Court's grant of summary judgment in favor of the New Jersey Supreme Court and the New Jersey Board of Bar Examiners.

B. NEW JERSEY'S INTEREST IN INSURING THE HIGHEST STANDARDS FOR MEMBERS OF ITS BAR AND IN AVOIDING REPETITIOUS LITIGATION FAR OUTWEIGHS ANY NEED FOR ADDITIONAL PROCEDURAL SAFEGUARDS.

Even if this Court concludes that petitioner has identified a protected interest, petitioner is unable to demonstrate that New Jersey's court rule is not rationally related to a legitimate State interest. Having determined that a protected interest is involved, the Court must engage in a balancing test to determine the appropriate procedural safeguards. *Loudermill*, 470 *U.S.* at 541 (where a protected interest is found, "the question remains what process is due"). The test requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional

> or substitute procedural requirement would entail.
>
> [*Matthews v. Eldridge*, 424 *U.S.* 319, 335 (1976).]

Accord Walters v. National Ass'n of Radiation Survivors, 473 *U.S.* 305, 321 (1985).

Assuming that petitioner's pursuit of a legal career constitutes a private interest, it was New York and not New Jersey that determined, after a full hearing, that he was unfit to practice law. He should not be permitted to challenge that determination in New Jersey.

Moreover, it is highly unlikely that a worthy candidate will be excluded from consideration by a blanket prohibition of disbarred attorneys and that likelihood is of no constitutional significance. More importantly, if petitioner were to argue that New Jersey had erred in his particular circumstances, the Court would have to reject that argument since "the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.' " *Walters*, 473 *U.S.* at 321 (quoting *Matthews*, 424 *U.S.* at 344).

In addition, because New York has already afforded petitioner a full hearing and access to its appellate courts, there is absolutely no value to additional procedural safeguards in New Jersey. Here, petitioner argues that having had a pre-termination hearing in New York, he is entitled to a post-termination hearing in New Jersey. Petitioner

fails to support this position with any case law. Respondents submit that there is no value in forcing New Jersey to revisit issues thoroughly explored in New York.

Courts have recognized "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." *Walters*, 473 *U.S.* at 320-21. The marginal gain is negligible, if not non-existent, where a court is asked to reconsider issues or claims that have been conclusively decided in another forum. By prohibiting appellant from relitigating the issues relating to his disbarment, New Jersey's court rule merely codifies the well-established doctrines of res judicata and collateral estoppel which are specifically designed to conserve scarce judicial resources by preventing parties from reopening settled disputes. *See generally Allen v. McCurry*, 449 *U.S.* 90, 94 (1980) ("res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication"); *Parklane Hosiery v. Shore*, 439 *U.S.* 322, 326 (1979). The policies underlying res judicata are considered so strong that preclusive effect is given to judgments even though they "may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores v. Moitie*, 452 *U.S.* 394, 398 (1981). Those same policies underlie New Jersey's court rule and must prevent an attorney from asking New Jersey to pass judgment on another state's disciplinary proceedings.

Finally, the New Jersey Supreme Court has an undisputed interest in guaranteeing the highest standards for members of New Jersey's bar.

> It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."
>
> [*Schware v. Board of Bar Examiners*, 353 *U.S.* 232, 247 (1957) (Frankfurter, J., concurring).]

While for much of its history the bar was self-regulating, it now falls upon the states to set requirements that insure that attorneys are suited to their considerable responsibilities. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 *U.S.* 423, 434 (1982); *Ohralik v. Ohio State Bar Ass'n*, 436 *U.S.* 447, 460 (1978). While states seek to protect consumers by regulating all licensed professionals, "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been 'officers of the courts.' " *Goldfarb v. Virginia State Bar*, 421 *U.S.* 773, 792 (1975). The profession's interest in maintaining high moral and ethical standards is so strong as to outweigh any concern for the individual attorney's livelihood. *Ohralik*, 436 *U.S.* at 460 ("the promotion of justice rather than the earning of fees is the goal of the profession." (quoting Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U.Chi.L.Rev 674 (1958))).

New Jersey has chosen to deny admission to applicants who have been found unfit to practice law in other

states. It seems obvious that the public would have little confidence in a system which allowed attorneys to evade the consequences of disbarment in New York by simply crossing the Hudson River to establish a practice in New Jersey. New Jersey's strong interest in insuring the integrity of the bar supports its decision to deny disbarred attorneys the right to sit for the bar examination.

C. NEW JERSEY'S COURT RULE PREVENTING ATTORNEYS WHO ARE UNABLE TO PROVIDE A CERTIFICATE OF GOOD STANDING FROM TAKING THE BAR EXAMINATION BEARS A RATIONAL RELATIONSHIP TO ITS INTEREST IN INSURING THE HIGHEST STANDARDS FOR MEMBERS OF THE BAR AND, THUS, PETITIONER'S EQUAL PROTECTION CLAIMS ARE WITHOUT MERIT.

For the purposes of equal protection analysis, the right to practice law is neither a privilege nor immunity of State or United States citizenship nor a right otherwise created by federal law. *Leis v. Flynt*, 439 *U.S.* 438, 442-43 (1979); *Edelstein v. Wilentz*, 812 *F.*2d 128, 132 (3d Cir. 1987). Rather, the practice of law is but one of many professions subject to the state's broad regulatory powers for the protection of the public. In the case of lawyers, the state also has an additional interest in insuring the integrity of the judicial system. Therefore, unless it creates suspect classifications or impinges upon fundamental rights, a regulation affecting the practice of law is subject only to a "rational basis review" as is any economic or social legislation. *See Schumacher v. Nix*, 965 *F.*2d 1262,

1266 (3d Cir. 1992), *cert. denied*, ___ *U.S.* ___, 113 *S.Ct.* 1252 (1993).

The Equal Protection Clause has been described as "a paradigm of judicial restraint" rather than "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Federal Communications Comm. v. Beach Communications, Inc.*, ___ *U.S.* ___ 113 *S.Ct.* 2096, 2101 (1993). Legislation necessarily " 'requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line' " but an argument that "the line might have been drawn differently at some points is a matter for legislative rather than judicial consideration." *Id.* at 2102 (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 *U.S.* 166, 179 (1980)). The rational basis analysis requires only that such persons are classified "in a manner rationally related to legitimate government objectives." *Schweiker v. Wilson*, 450 *U.S.* 221, 230 (1981). "The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient . . . " to defeat the constitutional challenge. *Beach Communications*, 113 *S.Ct.* at 2104 (quoting *Vance v. Bradley*, 440 *U.S.* 93, 112 (1979)). *Accord Sullivan v. Stroop*, 496 *U.S.* 478, 485 (1990) (regulation must be upheld where "any state of facts reasonably may be conceived to justify it"). Indeed, rational basis review begins with a "presumption of validity against attack under the Equal Protection Clause." *Parham v. Hughes*, 441 *U.S.* 347, 351 (1979).

It is self-evident that the requirement of a good standing certificate does properly exclude many unfit applicants. Petitioner would no doubt concede that an attorney should not be admitted to the bar in New Jersey

if he had just been disbarred by New York as the result of multiple incidents of outright theft from clients. He contends, however, that because it does not adequately consider present fitness to practice, New Jersey's court rule inadvertently excludes attorneys who have made efforts to improve themselves since the time of their earlier disbarment. He further cites to New Jersey disciplinary cases to illustrate that some New Jersey attorneys have not been disbarred for misconduct far more serious than his. These arguments carry no weight in a rational basis review.

Petitioner's claim is nothing more than an allegation that the New Jersey Supreme Court's "line-drawing" could have been more inclusive. But the court rule need not draw distinctions with "mathematical exactitude," *City of New Orleans v. Dukes*, 427 *U.S.* at 297, 303 (1976), even where the inclusion results in some inequality. *McGowan v. Maryland*, 366 *U.S.* 420, 425-26 (1961). Thus, the fact that the court rule is overinclusive is of no legal significance. By admitting the relevance of New Jersey's requirement of a certificate of good standing, petitioner effectively concedes that such a requirement is "rationally related" to the State's interest in insuring the quality of the bar and accordingly, petitioner's equal protection claims were properly dismissed. (*See* Pa7-Pa8 n.1).

D. PETITIONER'S ARGUMENT THAT NEW YORK'S EVIDENTIARY STANDARD FOR ATTORNEY DISCIPLINE IS UNCONSTITUTIONAL AND, THEREFORE, CANNOT BE RELIED ON BY NEW JERSEY LACKS MERIT.

The petitioner raises this issue and the issue addressed in section E *infra* for the first time in his petition for certiorari.[4]

This Court has stated that ordinarily it will not "decide a question not raised or involved in the lower court." *Youakim v. Miller*, 425 *U.S.* 231, 234 (1976). *Accord Delta Airlines, Inc. v. August*, 450 *U.S.* 346, 362 (1981) (question presented in petition but not raised in court of appeals "is not properly before us"). Furthermore, the Court has stated: "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed." *Duignan v. United States*, 274 *U.S.* 195, 200 (1927). However, in cases where there is a purely legal question presented in a petition for certiorari, the Court has stated that it may review the issue even if it was not addressed by the lower courts. *Mitchell v. Forsyth*, 472 *U.S.* 511, 528 (1985); *Nixon v. Fitzgerald*, 457 *U.S.* 731, 743 n.23 (1982).

Although the Court has not foreclosed the possibility of review of an issue not presented below, the respondents submit that two reasons exist which should prevent petitioner from raising the issue now.

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[4] In the Court of Appeals, petitioner moved to file a supplemental brief that included the issue addressed in section E of this brief. That motion was denied by order dated May 11, 1994.

First, the issue is collateral to the issue currently before the Court. The issue raised challenges the constitutionality of the evidentiary standard adopted by the New York courts for disciplining attorneys in that State. The issue properly should have been raised by petitioner in the appellate courts of New York and, then, presented to this Court on review from a final decision of those courts. However, in his petition for certiorari to this Court after his disbarment proceedings in New York, he did not raise the issue. *See Mirman v. Grievance Comm. for Second and Eleventh Judicial Dists.*, 60 *U.S.L.W.* 3641, 3657 (Mar. 24, 1992). Thus, petitioner failed to raise the issue at the proper time and should not be allowed to do so now.

Second, petitioner failed to raise the issue of the constitutionality of the differing standards in his complaint. The compiaint clearly set forth petitioner's allegations against the respondents and the complaint was answered based solely on those allegations. Thus, raising the issue at this juncture and seeking review by this Court is inappropriate.

Even if this Court determines that petitioner can raise the issue at this point in the proceedings and decides to review the matter substantively, petitioner's argument is flawed and must fail. The fair preponderance of the evidence standard relied on by the New York courts in attorney disciplinary matters has been challenged in the New York courts in the past and has passed constitutional muster. In *In re Capoccia*, 453 *N.E.*2d 497 (N.Y. 1983), the appellant challenged the constitutionality of the evidentiary standard used by the New York courts in attorney disciplinary matters. The New York Court of

Appeals found that the standard of proof, a fair preponderance of the evidence, did not violate the United States Constitution. *Id.* at 552. Also, the court pointed out that the standard had been challenged in the past and had been upheld in *In re Sutton*, 403 *N.E.*2d 467 (N.Y.), *cert. denied*, 449 *U.S.* 944 (1980), *reh'g denied*, 449 *U.S.* 1104 (1981). *Id.* at 553.

The basis for the *Capoccia* Court's decision was that the privilege of practicing law can be classified as a "property interest, as to which the higher [clear and convincing] standard of proof has not been required." *Id.* The cases cited by Capoccia, in which the preponderance of the evidence standard was found to be lacking, were based on the denial of personal or liberty rights, which require the imposition of a higher evidentiary standard. *See Addington v. Texas*, 441 *U.S.* 418 (1979).

Thus, the constitutionality of New York's evidentiary standard has been addressed on more than one occasion by the highest court of that State and has passed constitutional muster.

Also, in support of his proposition, petitioner cites several federal court decisions. In all of those cases, the courts have stated that the clear and convincing evidentiary standard must be followed by the federal courts in attorney disciplinary actions. However, none of those cases have held that that standard is constitutionally mandated.[5] Rather, all

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[5] In his brief, petitioner states that the court in *In re Medrano*, 956 *F.*2d 101 (5th Cir. 1992), held that the " 'clear and convincing standard' [is necessary] to satisfy constitutional guarantees of due process." (Petitioner's brief at 25). That contention is erroneous. Rather, the *Medrano* Court stated: "Notice of the allegations and the disbarment proceedings must satisfy

of the cases cited relate to disciplinary proceedings against attorneys practicing before the courts of the United States, a separate and distinct sovereign that can determine which evidentiary standard it will use in disciplining attorneys. Thus, petitioner has failed to cite a case in which the preponderance of the evidence standard in attorney disciplinary matters was deemed unconstitutional.

The premise of petitioner's argument is that there should be a uniform evidentiary standard in attorney disciplinary matters. However, the United States Constitution does not mandate such an evidentiary standard and, therefore, each sovereign is free to determine which evidentiary standard it will follow in disciplining attorneys that practice in its courts.

E. STATUTES OR RULES THAT CREATE AN IRREBUTTABLE PRESUMPTION ARE NOT PRESUMPTIVELY UNCONSTITUTIONAL.

Petitioner's claim that New Jersey's court rule creates an irrebuttable presumption and, therefore, is unconstitutional is without merit. In support of that proposition, petitioner relies primarily on *Stanley v. Illinois*, 405 *U.S.* 645 (1972) and *Cleveland Bd. of Educ. v. LaFleur* 414 *U.S.* 632 (1974). In those cases, the challenged statutes created an irrebuttable presumption that affected, in one way or another, the family unit. In *Stanley v. Illinois*, the statute in

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the requirements of procedural due process." However, the court did not address the issue of the constitutionality of the differing evidentiary standards in attorney disciplinary matters nor was that issue raised. The Court stated simply that a "federal court may disbar an attorney only upon presentation of clear and convincing evidence. . . . " *Id.* at 102 (citations omitted).

question created an irrebuttable presumption that an unmarried father could not care for his children after their mother's death. Under the Illinois statute an unwed father was automatically denied custody of the children without a hearing whereas all other parents – married, divorced and widowed parents and unwed mothers – were given a hearing. In *Cleveland Bd. of Educ. v. LaFleur*, the school regulations in question created an irrebuttable presumption that required all pregnant teachers to leave at the beginning of their fifth month of pregnancy and prohibited the teacher from returning to her position until the beginning of the school semester in which her child was at least three months old.

In both cases, the Court reviewed the reasons presented by Illinois and the school boards respectively and found that the reasons advanced unconstitutionally burdened a protected interest. Thus, in *Stanley v. Illinois*, the Court found that the Illinois statute denied Stanley the equal protection of the law because it afforded all parents, except unmarried fathers, a hearing before their children were taken by the State. *Id.* at 658. Thus, the Illinois statute denied Stanley the "cognizable and substantial" interest of retaining custody of his children. *Id.* at 652. In *Cleveland Bd. of Educ. v. LaFleur*, the Court stated that the school board regulations in question violated due process "because of their use of unwarranted conclusive presumptions that seriously burden the exercise of the protected constitutional liberty [of] freedom of personal choice in matters of marriage and family life." *Id.* at 651, 639.

Here, in contrast, the petitioner has failed to establish a protected interest. Moreover, even if the petitioner had

raised a cognizable interest, the New Jersey court rule, although creating an irrebuttable presumption, could withstand constitutional scrutiny because it is rationally related to New Jersey's interest in maintaining the integrity of its bar and the judicial system of the State as a whole. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 *U.S.* 159 (1976) (statute that created irrebuttable presumption that required uniformed state police officers to retire at age fifty was upheld as being rationally related to the State's interest of maintaining a physically fit police force). Moreover, here, the petitioner was afforded a hearing in New York and not, as was the case in *Stanley*, deprived of a protected right without any procedural safeguards.

Thus, petitioner's argument that the New Jersey court rule in question here creates an irrebuttable presumption and, therefore, is unconstitutional must fail.

CONCLUSION

For the foregoing reasons, the New Jersey Supreme Court and the New Jersey Board of Bar Examiners respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DEBORAH T. PORITZ
Attorney General of New Jersey
Attorney for Respondents
New Jersey Supreme Court and the
New Jersey Board of Bar Examiners
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

ANDREA M. SILKOWITZ
Assistant Attorney General
Counsel of Record

PATRICIA A. SCHIRIPO
Deputy Attorney General
On the Brief

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